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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

PARKASH RAM ATTUL,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Immigration Act of 1990 ("IMMACT") reorganized and rewrote 8 U.S.C. Sect. 1251, adding some new grounds of deportability and dropping others. IMMACT's amendments were specifically made applicable only in deportation proceedings commenced on or before March 1, 1991. A savings clause was included, stating that aliens formerly subject to several specified deportation grounds deleted by IMMACT would nonetheless remain deportable.

Former section 241(a)(5) of the Immigration and Nationality Act ("INA"), former 8 U.S.C. Sect. 1251(a)(5), made deportable any alien convicted for any reason under 18 U.S.C. Sect. 1546. This statute was amended (as recodified at current INA Sect. 241(a)(3)(B)(iii), current 8 U.S.C. Sect. 1251(a)(3)(B)(iii)) by IMMACT to reach "[18 U.S.C. Sect. 1546 convictions] *(relating to fraud and misuse of visas, permits, and other entry documents)* . . . " (emphasis supplied).

The questions presented are:

1) Does a conviction under 18 U.S.C. Sect. 1546 *not* "relating to fraud and misuse of visas, permits, and other entry documents" lead to deportability under current INA Sect. 241(a)(3)(B)(iii), current 8 U.S.C. Sect. 1251(a)(3)(B)(iii)?

2) May an indivdual charged and found deportable under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), based upon a conviction under 18 U.S.C. Sect. 1546 *not* "relating to fraud and misuse of visas, permits,

QUESTIONS PRESENTED – Continued

and other entry documents," still be deported despite the amendment and recodification of said statute at current INA Sect. 241(a)(3)(B)(iii), current 8 U.S.C. Sect. 1251(a)(3)(B)(iii)?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents iii

Table of Authorities iv

Opinions and Judgments Below 2

Statement of Jurisdiction 2

Statutes Involved 3

Statement of the Case .....

I. Basis for Federal Jurisdiction in the Court of First Instance 4

II. Statement of Facts 4

III. Proceedings Below 6

Reasons for Granting the Writ 8

Argument 8

I. The statutory subsection under which Mr. Attul was found deportable has been repealed 8

II. While Mr. Attul was concededly formerly deportable under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), he is no longer deportable due to the amendment of said statute 13

Conclusion 17

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Attul v. INS, 42 F.3d 958 (5th Cir. 1995) 7, 12

Bouis v. Aetna Cas. & Sur. Co., 91 F. Supp. 954, *reh'g denied*, 97 F. Supp. 236 (W.D.La. 1950) 10

Brown v. INS, 856 F.2d 728 (5th Cir. 1988) 17

Cannon v. University of Chicago, 441 U.S. 677 (1979) 10

Conroy v. Aniskoff, 113 S. Ct. 1562 (1993) 10

Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) 12

INS v. Nat'l Center for Immigrants' Rights, Inc., 112 S. Ct. 551 (1991) 11

Johnson v. U.S., 225 U.S. 405 (1912) 10

McElroy v. U.S., 455 U.S. 642, *reh'g denied*, 456 U.S. 965 (1982) 10

Platt v. Union Pacific R. Co., 99 U.S. 48 (1878) 10, 14

Pritchett v. INS, No. 93-5546 (5th Cir. July 6, 1994), *cert. denied*, 115 S. Ct. 421 (1994) 13

U.S. v. Blue Sea Line, 553 F.2d 445 (5th Cir. 1977) 16

U.S. v. Campos-Serrano, 404 U.S. 293 (1971) 9

U.S. v. Dickerson, 310 U.S. 554 (1940) 10

U.S. v. Tamayo, 427 F.2d 1072 (9th Cir. 1970) 11

U.S. v. Wallington, 889 F.2d 573 (5th Cir. 1989) 11

U.S. Nat. Bank of Or. v. Independent Ins. Agents, 113 S. Ct. 2173 (1993) 11

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE DECISIONS:

Matter of B – , 5 I&N Dec. 255 (BIA 1953) 14, 15

Matter of R – , 5 I&N Dec. 463 (BIA 1953) 16

Matter of Wadud, 19 I&N Dec. 182 (BIA 1984) 11

FEDERAL STATUTES:

United States Code:

1 U.S.C. Sect. 109..... 16

Former 8 U.S.C. Sect. 1251(a)(5)..... *passim*

Former 8 U.S.C. Sect. 1251(a)(6)..... 13

8 U.S.C. Sect. 1105a(a) 4

8 U.S.C. Sect. 1154(c) 5

8 U.S.C. Sect. 1182(c) 6, 7

8 U.S.C. Sect. 1251(a)(3)(B)..... 3, 6, 7, 9, 11, 13

8 U.S.C. Sect. 1256..... 5

8 U.S.C. Sect. 1325(b)..... 5

18 U.S.C. Sect. 2..... 5

18 U.S.C. Sect. 1546..... 5, 6, 7, 9, 10, 11

28 U.S.C. Sect. 1254(1)..... 2

Immigration and Nationality Act:

Former INA Sect. 241(a)(5)..... *passim*

Former INA Sect. 241(a)(6)..... 13

INA Sect. 204(c) 5

TABLE OF AUTHORITIES – Continued

Page

INA Sect. 212(c) 6, 7

INA Sect. 241(a)(3)(B) 6, 7, 9, 11, 13

INA Sect. 246 5

INA Sect. 275(b) 5

Other Statutes:

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ("IMMACT") 9, 10, 11, 12, 13, 14

Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 ("IRCA") 9

COURT RULES:

SUP. CT. R. 20.1 2

SECONDARY SOURCES:

C. GORDON AND S. MAILMAN, IMMIGRATION LAW AND PROCEDURE 11, 13

U.S. Code Cong. & Ad. News 9

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Parkash Ram Attul, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgments of the United States Court of Appeals for the Fifth Circuit entered in this matter on January 24, 1995.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on January 24, 1995, are reprinted in the Appendix to this Petition at pages App. 1 through App. 4. The order of the United States Court of Appeals for the Fifth Circuit, staying the issuance of its mandate, entered on February 16, 1995, is reprinted in the Appendix at pages App. 5 through App. 6. The decision and order of the Board of Immigration Appeals, filed March 9, 1994, are reprinted in the Appendix at pages App. 7 through App. 17. The decision and order of the Immigration Judge, filed February 26, 1991, are reprinted in the Appendix at page App. 18.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 24, 1995, affirming the Board of Immigration Appeals' decision dated March 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1) and SUP. CT. R. 20.1.

STATUTES INVOLVED

This case involves the following provisions of the United States Code:

Former 8 U.S.C. Sect. 1251(a)(5)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who – [. . .]

> (5) Has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266(c) of this title, or under section 36(c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or has been convicted under section 1546 of title 18 of the United States Code [. . . .]

Current 8 U.S.C. Sect. 1251(a)(3)(B)(iii)

(a) CLASSES OF DEPORTABLE ALIENS. – Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens: [. . .]

> (3) FAILURE TO REGISTER AND FALSIFICATION OF DOCUMENTS. – [. . .]
>
> > (B) FAILURE TO REGISTER OR FALSIFICATION OF DOCUMENTS. – Any alien

> who at any time has been convicted – [. . .] (iii) of a violation of, or a conspiracy to violate, section 1546 of title 18, United States Code (relating to fraud and misuse of visas, permits, and other entry documents), [. . .] is deportable.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Parkash Ram Attul herein seeks review of the decision by the Court of Appeals for the Fifth Circuit on his Petition for Review taken from the administrative decision by the Board of Immigration Appeals ("BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under 8 U.S.C. Sect. 1105a(a), which establishes the exclusive procedure for judicial review of such administrative decisions.

II. Statement of Facts

Mr. Attul, a native and citizen of India, entered the U.S. in legal immigrant status on May 29, 1983, based on the petition of his ex-wife, Deborah Sanders, a U.S. citizen he had married while previously in the U.S. in 1982. Certified Administrative Record ("A.R."), as filed with the U.S. Court of Appeals for the Fifth Circuit in Case No. 94-40255, at 344. He divorced Ms. Sanders on November 21, 1984. A.R. at 517. He married his current spouse, Shelly Attul, on October 11, 1985. A.R. at 393. Mr. and Mrs. Attul have two U.S.-born children.

On December 4, 1994, Mr. Attul was convicted under 18 U.S.C. Sects. 2 and 1546 (on the second of two counts) for having aided and abetted another individual in filing an INS Form I-130 immediate relative petition which falsely stated that that individual was living with his U.S. citizen spouse at the time of the petition. A.R. at 349-53; 513.

After Mr. Attul was indicted but before his conviction, his current wife filed her own immediate relative petition on his behalf; this petition was denied under INA Sect. 204(c), 8 U.S.C. Sect. 1154(c), based upon the government's belief that his former marriage to Ms. Sanders had itself been fraudulent. A.R. at 515-17. Although Mr. Attul gave a sworn statement admitting participation in fraudulent activity involving marriage by other immigrants, he denied that his marriage to Ms. Sanders was a fraud, maintaining that he had hoped the marriage would "work out." A.R. at 344-45. The government never sought, in any event, to rescind Mr. Attul's legal permanent resident status under INA Sect. 246, 8 U.S.C. Sect. 1256, nor to prosecute him for marriage fraud under INA Sect. 275(b), 8 U.S.C. Sect. 1325(b). The good faith of his current marriage has never been questioned.

Since he married his current wife Mr. Attul has led an exemplary life in the U.S.; his family is devoted to him, and he has created a highly successful business that has employed over one hundred U.S. citizens over the years. A.R. at 388-506. In granting him a waiver of deportability, the IJ stated that Mr. Attul's family, property, and business ties to the U.S. constituted "unusual and outstanding" positive equities, and also cited his rehabilitation,

along with the hardship his family would suffer should he be deported. A.R. at 159-63.

III. Proceedings Below

INS issued an Order to Show Cause to Mr. Attul on December 4, 1985, charging him with deportability under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5) (now codified at INA Sect. 241(a)(3)(B), 8 U.S.C. Sect. 1251(a)(3)(B)), based upon his conviction under 18 U.S.C. Sect. 1546. A.R. at 513, 792.

Mr. Attul was found deportable by an Immigration Judge ("IJ"), and applied to the IJ for a waiver of deportability under INA Sect. 212(c), 8 U.S.C. Sect. 1182(c). The IJ denied the waiver claim and ordered Mr. Attul deported on July 9, 1987. A.R. at 825. He appealed to the BIA, but before the appeal could be adjudicated the record of proceedings was destroyed by fire; the matter was accordingly remanded on January 29, 1989 to the IJ for de novo proceedings, by agreement of both parties. A.R. at 794-98.

Mr. Attul was again found deportable, and renewed his waiver claim under INA Sect. 212(c), 8 U.S.C. Sect. 1182(c). This time, at a hearing on February 26, 1991, the IJ granted the waiver, ruling that his criminal conviction was sufficiently offset by "clearly established unusual and countervailing equities." A.R. at 163. The government appealed, arguing that the waiver only cures deportation grounds for which there exist equivalent grounds of excludability, and that there are no such grounds corresponding to former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5). A.R. at 231-40; 245-47.

For his part, Mr. Attul moved for termination, arguing that IMMACT's 1990 amendment to former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5) limited the applicability of said statute, as recodified at INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii), to those convictions under 18 U.S.C. Sect. 1546 that relate only to visas, permits and other entry documents, and not to immigration marriage petitions such as his case involved. A.R. at 31-37. He reasoned further that, although his administrative proceedings were nominally governed by the former version of the statute since they had commenced prior to the amendment in question, it would be unfair and illegal to deport him on a since-repealed deportation ground, absent an explicit savings provision. A.R. at 18-20.

On March 9, 1994, the BIA sustained the government's appeal and once again ordered Mr. Attul deported, agreeing that deportability under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), could not be waived under INA Sect. 212(c), 8 U.S.C. Sect. 1182(c). A.R. at 1-8. The BIA explicitly considered and rejected Mr. Attul's arguments as to deportability, ruling that IMMACT had not limited the scope of former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), and that even if it had, Mr. Attul would remain deportable because his case, having been brought under the former law, remained governed by it. A.R. at 2-5. Mr. Attul then filed a Petition for Review in the U.S. Court of Appeals for the Fifth Circuit, reurging the same arguments raised before the BIA. The Fifth Circuit denied the petition in a published opinion. *Attul v. INS*, 42 F.3d 958 (5th Cir. 1995).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision in the present matter raises troubling issues regarding the retroactivity of ameliorative legislation, or, put another way, regarding the continuing applicability of repealed statutes. As further elaborated below, Mr. Attul stands to be expelled from this country on grounds that are nowhere to be found in current deportation statutes, a result forbidden by the BIA's own precedent cases. Congress is continually revising U.S. immigration laws, discarding outmoded deportation grounds and devising new ones. The implications of this case therefore, reach far beyond Mr. Attul's own threatened suffering and that of his U.S. citizen wife and children, since based on the Fifth Circuit's approach, anyone formerly subject to deportation on grounds that Congress has since seen fit to eliminate still faces expulsion.

ARGUMENT

I. The statutory subsection under which Mr. Attul was found deportable has been repealed.

At the time that Mr. Attul was found deportable under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), said statute applied to "[a]ny alien . . . who . . . has been convicted under section 1546 of title 18 of the United States Code." 18 U.S.C. Sect. 1546, at that time, bore the title "Fraud and misuse of visas, permits, and other entry documents." Prior to the amendment of former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), the language of 18 U.S.C. Sect. 1546 referring

to "entry documents" was the subject of various lawsuits. In 1976 the Supreme Court ruled that possession of a fraudulent "green card" was not punishable under the statute, since such card is not an entry document. *U.S. v. Campos-Serrano*, 404 U.S. 293 (1971). One of the enforcement-minded provisions of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (Nov. 6, 1986) ("IRCA") closed this perceived loophole, however, by broadening the applicability of 18 U.S.C. Sect. 1546 to include "border crossing card[s], alien registration receipt card[s], or other document[s] prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States." The statute's title was also amended to read: "Fraud and misuse of visas, permits, and other documents." *See* IRCA Sect. 103(a).

In 1990, Congress completely revised and recodified INA Sect. 241, 8 U.S.C. Sect. 1251, which sets forth the various grounds of deportability. *See* Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990) ("IMMACT"). The stated legislative intent behind IMMACT's wholesale amendment of the statute was to effect "a comprehensive revision of all the existing grounds for exclusion and deportation, *including the repeal of outmoded grounds . . .* " (emphasis supplied). *See* 1978 U.S. Code Cong. & Ad. News 6793.

Among other changes, IMMACT amended the above-quoted language of former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), so that it now reads, as currently codified at INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii), as follows: "[a]ny alien who at anytime has been convicted . . . of a violation of, or a conspiracy to

violate, section 1546 of title 18, United States Code (*relating to fraud and misuse of visas, permits, and other entry documents*)" (emphasis supplied). *See* IMMACT Sect. 602(a). It is maintained herein that by virtue of this change, the scope of this deportation statute has been limited so that it no longer reaches 18 U.S.C. Sect. 1546 convictions, such as that of Ms. Pritchett, that do *not* relate to "visas, permits, and other entry documents."

There appears no other reasonable explanation for Congress' use of the very language at issue in *Campos-Serrano* to amend former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), than that it intended thereby to limit the statute's reach. When Congress adds restrictive language to a statute it is presumed to have restrictive intent. *Bouis v. Aetna Cas. & Sur. Co.*, 91 F. Supp. 954, 958, *reh'g denied*, 97 F. Supp. 236 (W.D.La. 1950). Congress is further presumed to legislate with full knowledge of existing law, including judicial glosses; such presumption applies a fortiori where, as here, the Supreme Court itself has glossed the issue. *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1566 (1993); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

If Congress did not intend in IMMACT to restrict former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), the language it added would be mere surplus verbiage. Relevant caselaw overwhelmingly rejects such an interpretation. *See, e.g., Platt v. Union Pacific R. Co.*, 99 U.S. 48, 58 (1878). The fact that the statutory language was changed implies a change in purpose, an implication which must be overcome by persuasive evidence to the contrary. *McElroy v. U.S.*, 455 U.S. 642, 651 n.13 (citing *Johnson v. U.S.*, 225 U.S. 405, 415 (1912), and *U.S. v.*

Dickerson, 310 U.S. 554, 561 (1940)), *reh'g denied*, 456 U.S. 965 (1982). Research discloses no such evidence.

IMMACT also changed former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5) by grouping it, as now recodified at INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii), under the rubric of "Failure to Register or Falsification of Documents," as set forth in INA Sect. 241(a)(3)(B), 8 U.S.C. Sect. 1251(a)(3)(B). It has long been held that the title and heading are useful referents in construing an ambiguous statute. *U.S. Nat. Bank of Or. v. Independent Ins. Agents*, 113 S. Ct. 2173, 2184 (1993); *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991); *see also U.S. v. Wallington*, 889 F.2d 573, 577 (5th Cir. 1989). The fact that Mr. Attul was convicted neither for failing to register nor for falsifying documents therefore further militates against deportability in the present case.

The deportation statute here at issue has been characterized by the leading commentator as a "severe mandate." 3 C. Gordon & S. Mailman, Immigration Law and Procedure Sect. 71.07[2][a] (rev. ed. 1995). It potentially reaches an extremely wide and ill-defined range of misconduct, due to the vagueness of the underlying criminal statute, 18 U.S.C. Sect. 1546. *See U.S. v. Tamayo*, 427 F.2d 1072, 1073 (9th Cir. 1970) (labeling 18 U.S.C. Sect. 1546 a "masterpiece of obfuscation"). It encompasses acts of a relatively innocuous nature compared, for instance, with serious drug offenses. Yet a serious drug crime may be waived for immigration purposes, while there is no waiver for INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii). *Matter of Wadud*, 19 I&N Dec. 182, 185-86 (BIA 1984).

The Supreme Court has emphatically ruled that ambiguous immigration statutes are to be construed in favor of the alien, due to the severe hardship deportation entails. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). The present case is a prime example of the disproportionately harsh consequences threatened by this particular deportation statute, involving as it does a relatively minor infraction and the threat to an admittedly good-faith marriage involving U.S. citizens. While it is submitted, as argued above, that relevant jurisprudence clearly requires a finding that the deportation statute here at issue does not apply to Mr. Attul, the statute is at best ambiguous, and thus cannot support his deportation under *Fong Haw Tan*.

The BIA, without further analysis or citation to authority, simply concluded that the revision by IMMACT of former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5) did not have the effect of limiting its scope. A.R. at 5. The Fifth Circuit never reached this issue, because it agreed with the BIA that the current case remains governed by the former version of the statute. *Attul v. INS*, 42 F.3d at 959 n.1. This issue does need to be resolved by the Supreme Court, and it is submitted that nothing in the applicable BIA or Fifth Circuit decisions adequately rebuts the above-related arguments raised by Mr. Attul on this issue.

II. While Mr. Attul was concededly formerly deportable under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), he is no longer deportable due to the amendment of said statute.

As noted above, the intent of Congress in IMMACT was to repeal outmoded deportation grounds. Among the grounds repealed were those based on membership in Communist or other perceived subversive groups, and also those based on certain medical conditions. *See* 1 C. Gordon & S. Mailman, Immigration Law and Procedure Sect. 2.04[11][h][ii] (rev. ed. 1995). It is maintained herein that the ground under which Mr. Attul was found deportable was also among the grounds repealed.

The Fifth Circuit, as noted, found that the present case is governed by former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), regardless of whether said statute was amended by IMMACT. 42 F.3d at 959 (citing *Pritchett v. INS*, No. 93-5546, slip op. at 7 (5th Cir. July 6, 1994), *cert. denied*, 115 S. Ct. 421 (1994)). This begs the question, however, of whether deportability, once established under an applicable pre-IMMACT ground, continues after the ground is *repealed* in relevant part by IMMACT.

It is submitted that an affirmative answer to this question would lead to absurd and untenable results. For instance, some individuals were formerly ordered deported under outmoded "Cold War" grounds for merely being affiliated in the U.S. with the Communist "or other totalitarian" political parties. *See* former INA Sect. 241(a)(6), former 8 U.S.C. Sect. 1251(a)(6). In IMMACT, Congress recognized the unfairness of these

provisions, abolished them as outmoded, and concentrated instead on realistic threats to national security. Under the BIA's approach in the present matter, individuals formerly found deportable on the outmoded, discredited grounds would still have to be deported, even though the grounds had since been discarded.

Mr. Attul argued to the Fifth Circuit that the BIA's position in the present case was belied by the inclusion in IMMACT of a savings clause which explicitly provides that individuals previously found deportable under certain deportation grounds removed by IMMACT shall remain so deportable despite such amendment. IMMACT Sect. 602(c). The approach taken by the BIA would render this savings clause completely superfluous, a result prohibited under *Platt, supra*. The only sensible reading of this savings clause is that Congress clearly presumed that anyone formerly deportable on grounds removed by IMMACT would *not* be considered to remain so deportable absent a similar savings provision. As there is no savings clause relating to the ground on which she was found deportable, Mr. Attul may not be deported now that said ground has been repealed.

The BIA itself previously endorsed the approach advocated in the present case by Mr. Attul, as he noted in his brief to the Fifth Circuit. In *Matter of B –* , 5 I&N Dec. 255 (BIA 1953), the respondent therein had been a member of the German Nazi Party prior to U.S. entry. He was charged with deportability under the Immigration and Nationality Act of 1918, as amended by the Internal Security Act of 1950. Under said provisions, membership in a totalitarian party of a foreign state triggered deportability without further inquiry. *Id.* at 256. The Immigration and

Nationality Act of 1952, however, limited the scope of this deportation ground to cover only those who advocate the establishment in the U.S. of a totalitarian government. *Id.* The BIA framed the issue involved as "whether the respondent, who is not deportable under the present provisions of law because of former membership in the Nazi Party, is nevertheless deportable under the provisions of a repealed statute." *Id.* at 257.

The issue in *B –* was further complicated by Congress' inclusion of a savings clause in section 405(a) of the Immigration Act of 1952, stating:

> "Nothing contained in this act, unless otherwise specifically provided therein, shall be construed to affect the validity of . . . any warrant of arrest, order or warrant of deportation, . . . which shall be valid at the time this act shall take effect; or to affect any . . . proceedings . . . brought . . . ; but as to all such . . . proceedings . . . the statutes or parts of statutes repealed by this act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Id. (ellipses in original).

The BIA held in *B –* that, although the respondent therein was deportable under the previous version of the relevant statute, he could no longer be deported because of the 1952 amendment, despite the seemingly applicable savings clause. It reasoned as follows: "we do not believe that we should ignore the plain mandate of Congress that a member or former member of a totalitarian party is not to be deported if such totalitarian party did not advocate the establishment of a totalitarian dictatorship in the United States." *Id.*

In another case of patent relevance in the present matter, which was also cited to the Fifth Circuit by Mr. Attul, deportability was charged based on inadmissibility at the time of entry. *Matter of R –* , 5 I&N Dec. 463 (BIA 1953). The previously applicable excludability ground had been repealed by the time deportation proceedings were brought, and the respondent in *R –* therefore would have been admissible had he sought to enter at such later time. *Id.* at 465. The BIA held that deportability could not be sustained in such a situation. *Id.* at 465 n.4 and accompanying text (citing cases similarly holding, where deportability charges based on since-revoked bars to naturalization).

The Fifth Circuit stated that *B –* had not been applied "outside of cases in which the repealed exclusion (sic) was based on race or politics." 42 F.3d at 959. It accordingly "decline[d] the invitation to extend *B –* . . . " *Id. B –* did not explicitly limit itself in such a way, however, and there appears no reason why it should be limited.

The only authority cited by the Fifth Circuit on this issue is the "General Savings Clause" found at 1 U.S.C. Sect. 109, which, in the language of the Fifth Circuit, "requires application of a pre-amendment statute dispensing a penalty unless Congress has substituted a right for what was a crime." 42 F.3d at 959. It is unclear why this statute is cited, since it applies to criminal, not civil, proceedings. *U.S. v. Blue Sea Line*, 553 F.2d 445, 448 (5th Cir. 1977). The Fifth Circuit has repeatedly refused to apply other criminal law doctrines in the immigration context, holding that deportation is not a "penalty" or "punishment," and that immigration proceedings are

accordingly of a civil rather than criminal nature. *See, e.g., Brown v. INS*, 856 F.2d 728 (5th Cir. 1988).

The Fifth Circuit's decision was clearly erroneous, and, as noted above, stands to lead to many more erroneous decisions if left undisturbed. Mr. Attul and his U.S. citizen wife and children face severe and undeserved hardship if the present petition is not granted.

CONCLUSION

For the reasons set forth hereinabove, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THOMAS P. ADAMS
631 St. Charles Avenue
New Orleans, LA 70130
Telephone (504) 523-3815

Attorney of Record for
Petitioner Parkash Ram Attul

Parkash Ram ATTUL, A38-118-133, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE. Respondent.

No. 94-40255.

United States Court of Appeals. Fifth Circuit.

Jan. 24, 1995.

Alien petitioned for review of his deportation order issued by the Board of Immigration Appeals following his perjury conviction. The Court of Appeals held that amendment of statute under which alien was found deportable did not affect his deportation, since he received notice of deportation before amendment became effective.

Petition denied.

Thomas P. Adams, New Orleans, LA, for appellant.

Janet Reno, Atty. Gen., U.S. Dept. of Justice, Robert L. Bombough, Div. I.N.S., Kristin A. Cabral, David J. Kline, Washington, DC, for appellee.

John B.Z. Caplinger, Deputy Director, I.N.S., Joseph A. Aguilar, New Orleans, LA, for other interested parties.

Petition for Review of an Order of the Board of Immigration Appeals.

Before REAVLEY, DUHÉ and PARKER, Circuit Judges.

PER CURIAM:

Parkash Ram Attul petitions us to review his deportation order handed down by the Board of Immigration Appeals (BIA). He contends that he is ineligible for deportation because of Congress's amendment to the statute under which the INS seeks to deport him. We deny his petition.

BACKGROUND

Attul, an Indian citizen, has been a permanent resident of the United States for eleven years. In December 1985, in response to charges that he participated in a fraudulent marriage scheme, Attul pleaded guilty to making false statements under penalty of perjury, in violation of 18 U.S.C. § 1546. Under 8 U.S.C. § 1251(a)(5) (1988) (amended 1990), violation of § 1546 is grounds for deportation. The Immigration and Naturalization Service (INS) commenced deportation proceedings, and an immigration judge declared Attul deportable in July 1987. During Attul's appeal to the BIA, a fire destroyed the records of his proceedings.

The INS renewed deportation proceedings in January 1989. On February 26, 1991, an immigration judge again found Attul deportable, but granted a waiver on the basis of unusual and outstanding equities. The INS appealed to the BIA, which affirmed the deportation order and vacated the waiver. Attul petitions us for review.

DISCUSSION

The BIA found Attul deportable under the pre-1990 version of 8 U.S.C. § 1251. Congress amended this statute in 1990, but the amended statute does not apply to Attul because he received notice of the deportation proceedings prior to March 1, 1991. *See Pritchett v. INS*, No. 93 5546, slip op. at 7 (5th Cir. July 6, 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 421, 130 L.Ed.2d 336 (1994). Furthermore, the amended statute does not affect a deportation order granted under the old statute. *Id.*

Nevertheless, Attul would have us construe the amended statute to determine his deportability. He cites *In re B-*, 5 I. & N. Dec. 255 (BIA 1953), to demonstrate that the BIA will not deport an alien under a statute that is no longer effective. In *B-*, the BIA withdrew the deportation order of a German national whose basis for deportation was his membership in the German Nazi Party. Congress had recently amended the statute to limit deportation to members of organizations that advocate such a regime in the United States. The BIA applied the new statute and concluded that the alien should not be deported, despite the existence of a valid savings provision. *Id.* at 257-58. The BIA considered its conclusion consistent with other decisions in which it refused to deport aliens that were racially barred from entry into this country after the racial bar had been removed. *Id.* at 258.

In the present case, the INS has commenced deportation proceedings against Attul because of his act of perjury, not because of his race or his party membership. The

BIA has not applied *B-*, outside of cases in which the repealed exclusion was based on race or politics. *Cf. United States v. Gruttadauro*, 818 F.2d 1323, 1325 n. 2 (7th Cir.1987) (explaining that the General Savings Clause, 1 U.S.C. § 109, requires application of a pre-amendment statute dispensing a penalty unless Congress has substituted a right for what was a crime). We decline the invitation to extend *B-*, in the face of the 1990 congressional enactment which states that the 1990 version of § 1251 will not apply to cases in which the alien has been provided with notice of the deportation proceedings prior to March 1, 1991. Immigration Act of 1990. Pub.L. No. 101-649, § 602(d), 104 Stat. 4978, 5082 (1990), *codified at* 8 U.S.C. § 1161 note (Supp. III 1991). We determine that the amended version of § 1251 is irrelevant to the issue of Attul's deportation.[1]

CONCLUSION

For the foregoing reasons, Attul's petition is DENIED.

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[1] The BIA determined that Attul was deportable under 8 U.S.C. § 1251(a)(3)(B)(iii) (Supp. III 1991). Because of the conclusion we reach, we need not address this issue.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

February 16, 1995

TO ALL COUNSEL:

No. 94-40255 – ATTUL v. INS

(Agency No. A38-118-133)

MANDATE RECALLED AND/OR STAYED TO AND INCLUDING April 17, 1995

The Court has granted the ( ) recall and/or (X) stay of the mandate to the date above. If during the period of the stay we receive notice from the Supreme Court Clerk that a petition for certiorari in that court has been filed, the stay shall continue until final disposition by the Supreme Court. If the Supreme Court denies certiorari, our mandate shall issue immediately under FRAP 41.

Under Supreme Court Rule 19.1, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made until the record is deemed essential by that court.

A copy of the opinion, judgment, or Local Rule 47.6 decision and denial of rehearing are still required by the Supreme Court as an appendix to your petition. Enclosed are copies of these documents.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ P. J. Thorne
Deputy Clerk

Enclosures
cc: Mr. Thomas P. Adams
Ms. Kristin A. Cabral

MDT-2
Rev. 7/12/94

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A38 118 133 – New Orleans

In re: PARKASH RAM ATTUL Date: Mar. 9, 1994

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Thomas P. Adams, Esquire
631 St. Charles Avenue
New Orleans, Louisiana 70130

ON BEHALF OF SERVICE: Agnelis L. Reese
General Attorney

CHARGE:

Order: Sec. 241(a)(5), I&N Act [8 U.S.C. § 1251(a)(5)] – Public charge

APPLICATION: Waiver of deportability

By the issuance of an Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien, dated December 4, 1985, the respondent was charged with being subject to deportation pursuant to section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(5), on the basis of his having been convicted of violating 18 U.S.C. § 1546, which is captioned "Fraud and misuse of visas, permits, and other entry documents." In a decision dated February 26, 1991, an immigration judge found the respondent to be deportable as charged, but waived his deportability pursuant to section 212(c) of the Act, 8

U.S.C. § 1182. The Service entered a timely appeal challenging the respondent's statutory eligibility for that relief. The respondent then made a motion to reconsider,[1] subsequently entered an untimely appeal, and finally moved to have these proceedings terminated, all of the aforementioned actions having been taken on the basis that he is not deportable as charged. In reaching our decision, we have considered all of the submissions made by the respondent subsequent to the issuance of the decision of the immigration judge. See 8 C.F.R. § 3.1(c). The appeal of the Service will be sustained. The appeal of the respondent will be dismissed. The respondent's motions will be denied.

Before proceeding to a discussion of why the respondent is precluded from being afforded the relief that the immigration judge determined that he was deserving of, we will first examine the basis for the validity of the immigration judge's determination that the respondent is deportable as charged.

It is the position of the respondent in his Motion to Reconsider and in his appeal of the immigration judge's decision that, insofar as his conviction was for aiding, abetting, or causing a violation of 18 U.S.C. § 1546, by virtue of his having assisted in another alien's "arranged marriage," rather than as a result of his making a false

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[1] A motion submitted while an appeal is pending before the Board is treated as a motion to remand pursuant to 8 C.F.R. § 3.1(d)(2). *See Hurwitz, Motions Practice Before the Board of Immigration Appeals*, 10 San Diego L. Rev. 79, 91 (1982), reprinted in 6 Immigration and Nationality Law Review, 472, 484 (1984).

statement by which he himself hoped to gain an immigration benefit, he was convicted of a violation of 18 U.S.C. § 2, and not 18 U.S.C. § 1546, and therefore is not deportable as charged. In support of this position, the respondent cites to *Matter of Gayo-Gayo*, 11 I&N Dec. 46 (BIA 1965) for the proposition that an alien convicted pursuant to 18 U.S.C. § 371 for conspiring to violate 18 U.S.C. § 1546 was not deportable pursuant to section 241(a)(5) of the Act. However, insofar as the respondent in these proceedings was in fact convicted of violating 18 U.S.C. § 1546, as reflected by the Judgment and Probation/Commitment Order which provides that the respondent pled guilty to and was convicted pursuant to both sections 2 and 1546 of Title 18 of the United States Code, *Matter of Gayo-Gayo, supra*, is not on point. We note that even if there was merit to the respondent's contention that his actual criminal behavior was not of the sort intended to be addressed by section 241(a)(5) of the Act, insofar as we are precluded from going behind the judicial record to determine the guilt or innocence of an alien, the respondent, having been convicted pursuant to 18 U.S.C. § 1546, is deportable as charged. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).

The arguments raised by the respondent in his Motion to Terminate relate to statutory changes which have come into effect since these proceedings were initiated. As previously noted, the respondent was charged with being deportable pursuant to section 241(a)(5) of the Act which subjected an alien to deportation if the alien " . . . ha[d] been convicted under section 1546 of title 18 of the United States Code." Section 241 of the Act was

revised by sections 602 and 603 of the Immigration Act of 1990, P.L. 101-649, Nov. 29, 1990. The current section providing for the deportation of aliens convicted of a violation of 18 U.S.C. § 1546 can now be found at section 241(a)(3)(B)(iii) of the Act. By its terms "[a]ny alien who at any time has been convicted – of a violation of, or a conspiracy to violate, section 1546 of title 18, United States Code (relating to fraud and misuse of visas, permits, and other documents), is deportable." It is the position of the respondent that he is not deportable by the terms of section 241(a)(3)(B)(iii) and that he may no longer be deportable pursuant to section 241(a)(5) of the Act.

The respondent finds support for his contention that he may no longer be deportable pursuant to section 241(a)(5) of the Act by virtue of the absence in the Immigration Act of 1990 of a "savings clause" relating to that provision. He points out that the Immigration Act of 1990, at section 602(c), provides, as follows:

> Notwithstanding the amendments made by this section, any alien who was deportable because of a conviction (before the date of the enactment of this Act) of an offense referred to in paragraph (15), (16), (17), or (18) of section 241(a) of the Immigration and Nationality Act, as in effect before the date of the enactment of this Act, shall be considered to remain so deportable.

He then contends that "it is clear from this language that Congress contemplated that anyone formerly deportable on grounds removed by [the Immigration Act of 1990] would *not* 'be considered to remain so deportable' absent a similar savings provision." He then notes that there is

no savings clause relating to the former section 241(a)(5) of the Act.

We are in disagreement with the respondent's assertion that absent a "savings clause" the respondent does not "remain so deportable." To the contrary, these proceedings fall within the purview of section 602(d) of the Immigration Act of 1990 which addresses the revisions accomplished by sections 602 and 603 of that Act; it provides that those revisions "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." In these proceedings, notice was provided to the respondent on December 4, 1985, and, accordingly, revisions accomplished by sections 602 and 603 of the Act do not apply to these proceedings.

In addition to the absence of a "savings clause" relating to section 241(a)(5) of the Act, the respondent also contends that because he would not be subject to deportation pursuant to section 241(a)(3)(B)(iii) of the Act, he should not be subject to deportation pursuant to the ground charged. It is the respondent's position that he would not be subject to deportation pursuant to section 241(a)(3)(B)(iii) of the Act because he was convicted for "making false statements under penalty of perjury," and the aforementioned revised section is, by its express terms, only intended to render deportable those aliens who have been convicted of charges "relating to fraud and misuse of visas, permits and other entry documents."

Again, section 241(a)(5) of the Act subjected an alien to deportation if the alien " . . . ha[d] been convicted under section 1546 of title 18 of the United States Code."

As revised, section 241(a)(3)(B)(iii) of the Act now provides for the deportation of an alien convicted "of a violation of, or a conspiracy to violate, section 1546 of title 18, United States Code (relating to fraud and misuse of visas, permits, and other documents)."

Contrary to the position of the respondent regarding the revision to the ground of deportability lodged in these proceedings, we find that that revision is of no consequence to these proceedings. It is the position of this Board that the parenthetical clause contained in section 241(a)(3)(B)(iii) of the Act, to wit, "(relating to fraud and misuse of visas, permits, and other documents)," is a reference to the caption of Section 1546 of title 18 of the United States Code which reads, in its entirety, "Fraud and misuse of visas, permits, and other entry documents," and is not intended to limit the scope of activities on the basis of which an alien charged with deportability under section 241(a)(3)(B)(iii) may be found deportable. As was the case for aliens charged with deportability pursuant to section 241(a)(5) of the Act, we will continue to consider any violation of 18 U.S.C. § 1546 to provide a basis for an alien's deportability. Accordingly, we find the respondent to be deportable as charged and we would also have found him to be deportable even had he been charged with being subject to deportation under the current section 241(a)(3)(B)(iii) of the Act.

We now turn to the question of why the respondent is precluded from being afforded the relief that the immigration judge determined that he was deserving of, to wit, a waiver of deportability pursuant to section 212(c) of the Act.

The immigration judge afforded the respondent a waiver of deportability pursuant to section 212(c) of the Act on the basis of longstanding judicial and administrative interpretations of the Act which have expanded section 212(c) to apply to some grounds of deportation. The Board initially interpreted section 212(c) narrowly to apply only in exclusion proceedings and not in deportation proceedings. *Matter of Arias-Uribe,* 13 I&N Dec. 696 (BIA 1971). This interpretation drew a distinction between resident aliens who had temporarily left the United States and were found excludable for some reasons upon return and those who had never left the United States and were found to be deportable upon the same grounds.

The Second Circuit found this distinction unconstitutional in *Francis v. INS,* 532 F.2d 268 (2d Cir. 1976). In *Francis,* the petitioner was a resident alien, subject to deportation under section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), for conviction of possession of marijuana, which would also have been grounds for exclusion. Section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23). Because section 212(c) relief would have been available for an excludable resident alien convicted of possession of marijuana, the Second Circuit held that denial of the same relief to the petitioner there would have violated the equal protection clause of the Fifth Amendment. *Francis,* 532 F.2d at 273.

The Board adopted this interpretation of section 212(c) in *Matter of Silva,* 16 I&N Dec. 26 (BIA 1976) (petitioner subject to deportation for conviction of possession of marijuana with intent to distribute allowed to apply for section 212(c) discretionary relief). The Board

did not, however, extend discretionary relief to all grounds for deportation. Instead, the BIA limited this extension of section 212(c) relief to deportable resident aliens whose grounds for deportation were also grounds for exclusion under section 212(a) for which discretionary relief was available under section 212(c). *See Matter of Wadud,* 19 I&N Dec. 182 (BIA 1984) (alien subject to deportation under section 241(a)(5) of the Act, 8 U.S.C. § 1251(a)(5), for conviction of aiding and abetting another alien to obtain a visa procured by fraud was not entitled to invoke section 212(c) relief because there is no analogous ground of exclusion); *Matter of Granados,* 16 I&N Dec. 726 (BIA 1979) (refusing to extend section 212(c) to allow relief from deportation for an alien convicted of possession of an unregistered sawed-off shotgun because such a conviction is not a section 212(a) ground for exclusion nor a crime involving moral turpitude that would render petitioner excludable under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9)), *aff'd,* 624 F.2d 191 (9th Cir. 1980).

In 1990, the Board expanded its interpretation of section 212(c) to include all grounds for deportation, even if not also grounds for exclusion under section 212(a), except for the grounds which are expressly precluded from relief by section 212(c). *Matter of Hernandez-Casillas,* (BIA, January 11, 1990) (Hernandez I). In that case, an alien was convicted of entry without inspection, a deportable offense under section 241(a)(2), but not grounds for exclusion under section 212(a). The Board withdrew its decisions in *Granados* and *Wadud,* and remanded the case to allow the alien to apply for a section 212(c) waiver.

The Attorney General granted the Service's request for review of the Board decision, disapproved the decision, and remanded for further proceedings consistent with his decision. *Matter of Hernandez-Casillas,* Int. Dec. Att. Gen. March 18, 1991 (Hernandez II). The Attorney General concluded that the Board lacked statutory authority to expand section 212(c) relief to grounds of deportation that are not also waivable grounds for exclusion. He stated that the Board's new interpretation of section 212(c) relief would disrupt the statutory scheme designed by Congress to govern deportation proceedings by allowing an alien to obtain relief under section 212(c) without meeting the standards for relief from deportation set forth in section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1).[2]

Courts reviewing the decisions of the Board have upheld the initial expansion of section 212(c) to grounds for deportation which have corresponding grounds for exclusion, and most courts have taken positions similar to that of the Attorney General and refused to extend section 212(c) relief to grounds of deportation which are not also grounds for exclusion. *Rodriguez v. INS,* 9 F.3d 408 (5th Cir. 1993).

In *Zinnanti v. INS,* 651 F.2d 420, 422 (5th Cir. Unit A 1981), the Fifth Circuit summarily denied section 212(c) relief to a petitioner convicted of possession of a sawed-

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[2] In order to be eligible for relief under section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1), there must be a showing that the alien is of good moral character and that his deportation would result in extreme hardship. These showings are not required in order to be eligible for relief under section 212(c).

off shotgun. In addition, the First and Ninth Circuits have recently addressed this issued [sic] and found section 212(c) relief to be unavailable in this situation. *See Campos v. INS*, 961 F.2d 309 (1st Cir. 1992) (agreeing with the reasoning of the Attorney General in *Hernandez II* and holding that an alien who was ordered deported on the basis of a conviction for possession of an unlicensed .22 caliber pistol was not eligible to apply for section 212(c) relief); *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988) (dismissing the petition for review of an alien convicted of possession of a sawed-off shotgun). Finally, the Seventh Circuit has recently held section 212(c) relief to be unavailable to a permanent resident alien found deportable for entering the United States without inspection. *Leal-Rodriguez v. INS*, 990 F.2d 939, 948-51 (7th Cir. 1993).

The 1990 amendments to the Act, which affected sections 212(c) and 241, were made after the Ninth Circuit rendered its decision in *Cabasug* and after the Attorney General agreed to review *Hernandez I*. We must assume that Congress was aware of the interpretation given to section 212(c) to extend only to deportation grounds with analogous waivable grounds for exclusion, and that Congress could easily have legislated a change to this interpretation had it wished to do so. *Rodriguez, supra.* Insofar as it did not, and there being no waivable ground of exclusion analogous to section 241(a)(5) of the Act, we are precluded from affording the respondent a waiver of deportability pursuant to section 212(c) of the Act regardless of the fact that, had there been an analogous ground of exclusion, he may very well have been deserving of that relief. Accordingly the following orders will be entered.

ORDER: The appeal of the Service is sustained.

FURTHER ORDER: The appeal of the respondent is dismissed.

FURTHER ORDER: The respondent's motion to reconsider is denied.

FURTHER ORDER: The respondent's motion to terminate is denied.

/s/ Mary Maguire Dunn
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

File No.: A 38 118 133 February 26, 1991

In the Matter of	)	
PARKASH ATTUL	)	IN DEPORTATION
	)	PROCEEDINGS
Respondent	)	
	)	

CHARGE:

APPLICATIONS:

ON BEHALF OF SERVICE:	ON BEHALF OF RESPONDENT:
Matilda Ann Baker, Esq.	Thomas Adams, Esq. David Kattan, Esq.

ORAL DECISION

This is the Oral Decision of the Immigration Judge. The respondent is a 36-year-old married man, a native and citizen of India, who has appeared before an Immigration Judge and been found to be deportable under Section 241(a) 5 of the Act. Today before me, that charge was clarified by the Government's submission of the indictment underlying respondent's conviction in 1985. Based upon the prior finding, deportability has been established by a clear convincing and unequivocal evidence. As and for relief from deportation, respondent has filed an application for relief under Section 212(c) of the Act on Form I-191 and has offered the testimony of himself, his wife, and two other witnesses, as well as a large volume of documentary evidence. Section 212(c) does

not, of course, provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General or his delegate is required to determine as a matter of discretion whether a respondent merits the relief sought. Additionally, the respondent bears the burden of demonstrating that his application warrants favorable discretion. The exercise of discretion in a particular case necessarily requires consideration of all the facts and circumstances involved. There must be a balancing of the social and humane considerations presented in a respondent's favor against the adverse factors evidencing his or her undesirability as a permanent resident. The Board of Immigration Appeals has enunciated a number of factors to be considered in determining whether or not to grant Section 212(c) relief. Favorable considerations have been found to include such factors as family ties within the United States, residents of long duration in this country, the age at which the residence began, evidence of hardship to respondent and his or her family if deportation occurs, service in the country's armed forces, the respondent's history of employment, the existence of property or business ties, the evidence of value and service to the community, proof of genuine rehabilitation, and other evidence attesting to a respondent's good character. Among the factors deemed adverse to a respondent are the nature and underlying circumstances of the exclusion or deportation ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and its nature, recency, and seriousness, and the presence of any other evidence

indicative of bad character or undesirability as a permanent resident. One or more of these adverse considerations may ultimately be determinative of whether Section 212(c) relief is granted in any case. The Board has also pointed out that as the negative factors grow more serious, it becomes incumbent upon the respondent to introduce additional offsetting favorable evidence which in some cases may have to involve unusual or outstanding equities. Such a heightened showing is required when a respondent has been convicted of a serious drug offense, particularly one relating to the trafficking or sale of drugs. The necessity of demonstrating unusual or outstanding equities is not exclusively triggered by serious crimes involving controlled substances. Rather, one must examine the gravity of the offense per se. Additionally, the Board has held that a showing of unusual or outstanding equities may be required because of a single serious crime or because of a succession of criminal acts which together establish a pattern of serious criminal misconduct. As noted by the Board, a respondent who demonstrates unusual or outstanding equities when required to do so does not compel favorable exercise of discretion, but instead, absent such equities, relief will not be granted in the exercise of discretion. There are cases, as the Board has noted, in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted even in the face of unusual or outstanding equities. Finally, the Board has noted in *Matter of Edwards* that, with respect to the issue of rehabilitation, a clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion in every case involving an alien with a criminal record. Rather,

Section 212(c) applications involving convicted respondents must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion.

Examining respondent's evidence in light of the factors set forth by the board in *Matter of Marin,* the Court finds that the adverse factor in respondent's case, which was his conviction upon his plea of guilty in 1985 to a federal indictment or parts of a federal indictment charging him with conspiracy to make false statements under penalty of perjury in connection with immigration fraud is, on the facts of the case, a serious crime which would require a showing of unusual and outstanding equities. Respondent explained his involvement in the crime by saying that he was new to this country and was not familiar with the laws. Respondent testified today that the extent of his participation in the conspiracy was giving Indian citizens rides to the Immigration Service where they would fill out petitions based upon fraudulent marriages. Respondent testified that he received no money from this scheme and did it to help someone from his hometown, which he believes is a cultural value in India. Respondent finished his probationary period as required by the Federal Court in 1988 and has had no further arrests or convictions in that time. The Government adduced other evidence intended to show bad character and undesirability as a permanent resident in the form of respondent's marital history. Respondent's first marriage was apparently to an Indian woman and lasted from 1974 until about 1983. Respondent was divorced in India, but according to the Government's suggestions, the divorce did not occur until after respondent had met and

married his first United States wife. Respondent met this woman, whose name was Debra Saunders, in the United States in early 1982 and married her a few days later. Respondent was in the United States as a seaman at that time. Respondent testified that he intended the marriage to be a real one, and that he took Debra Saunders to India to meet his mother, who was then very ill and wanted to meet respondent's wife. Respondent further testified that he did not procure customers for his wife, whom the Service has alleged in its documents was working as a prostitute. Respondent subsequently obtained a divorce from Debra Saunders and married his current wife in October of 1985.

As noted earlier, the Court believes that respondent's conviction in 1985 was a serious one, a single serious crime which would require a showing of unusual and outstanding equities. To counterbalance and offset the negative factors in his case, respondent has offered many positive factors. The Court finds that respondent's family ties in the United States are a positive factor and an unusual and outstanding equity in his case. Respondent's wife and his two daughters, ages four and eight months, are United States citizens. Additionally, respondent's wife has six siblings who have treated respondent as a member of their own family. Remaining in India are respondent's elderly father and his five married brothers and sisters, all of whom have many children. The Court finds that respondent's primary family ties are in the United States and, as noted earlier, that is an unusual and outstanding equity in his behalf. Also of favorable consideration in respondent's case is his residency of almost eight years beginning at the age of 28, and the fact that he has

not departed the United States since then. The Court does not consider this an unusual or an outstanding equity, but it will be considered a small plus in respondent's case. Respondent has offered no testimony about value and service to the community, so that will be of no help to him. The Court does note, however, that respondent works about 16 hours a day, 7 days a week, and that his lack of spare time to engage in community service is understandable under the circumstances. Respondent also apparently has not volunteered to serve in the Armed Forces of the United States, but that is also not a factor that will be counted against him. Another unusual and outstanding equity in respondent's case is his employment history. Respondent is a house painter by skill and trade. He has been employed since 1983 when he arrived in this country and has never been unemployed. Closely related to that is another unusual and outstanding equity in respondent's property and business ties in the United States. Respondent incorporated his own house painting business in 1985, and by his and all others' accounts, has worked long and hard to make it the enormous success that it is now. Respondent has an impeccable professional reputation and is a major subcontractor in a large home building business in the New Orleans area. Over the course of his five years as a self-employed businessman, respondent has employed more than 100 United States citizens, and employs a number of them now. Besides his own business, respondent has business and marital bank accounts. He has been buying a home since 1984. He owns the tools of his trade, including vehicles, and also owns a personal vehicle. Respondent grossed approximately $250,000.00 in his business in

1990. Another unusual and outstanding equity in respondent's case is the evidence [sic] good character which he has presented. These include letters from his neighbors, from general contractors who have employed him, from realtors, from satisfied customers, from other business associates and from many people and neighbors with whom he has had business and professional dealings. All of these people speak of respondent as a model citizen, an honest businessman, a trusted employee and a thoroughly professional person who is also a dedicated family man.

Another unusual and outstanding equity in respondent's case is the hardship to him and to his United States citizen wife and children if he were to be deported. Respondent believes that if he were to return to India and not take his wife and children with him, he would be devastated emotionally. Although he would be physically able to work, he would be virtually incapacitated without his family. He also believes that his children would suffer in India, that his father and his siblings would not be able to help him there, and that he would be unable to support himself as a house painter there. The hardship to respondent's family is also palpable. Respondent's older daughter has a close relationship with respondent, and, as his wife noted in her affidavit, the younger daughter would never really know her father. Mrs. Attul would be emotionally devastated. Her parents have recently died and, as she testified, respondent was very supportive of her during this period. Mrs. Attul's six siblings accept respondent as a member of their family. Respondent is the sole support for his wife and two children. Mrs. Attul is a high school graduate with minimal job skills. She believes that she would have to go on welfare and into

public housing if her husband were to be deported. Her siblings would not be able to support her and her two children. There is also evidence in the record that there would be emotional hardship to respondent's in-laws if he were to be deported. Mrs. Attul testified that respondent has been an excellent father and husband, and Mr. Attul further testified that he does not believe that his family, and especially his daughters, would be able to attain the kind of health care, higher education or equal opportunity as females that he wants them to have were he to take them with him to India.

Another somewhat positive factor in respondent's case is his statement of his own rehabilitation. Respondent testified that he would not make such a mistake again, that the focus of his life is his family and his business, and that he recognizes what he did was wrong. Although the Court could have hoped for a more thorough explanation of the circumstances of the crime and any reflection that respondent has had upon that, the Court also notes that respondent has been crime-free for more than two years and has satisfactorily completed his probation. The Court also notes that the sentence handed down by the Federal District Judge was not a particularly severe one, and it required respondent only to serve some 60 days in jail followed by two years and ten months of supervised probation. Weighing the adverse factors against the social and humane considerations of this case, the Court believes that respondent has clearly established unusual and countervailing equities in this case, that he has fully met his burden under Section 212(c) of the Act, and that his application should be granted as a matter of law and discretion.

Accordingly, the following Orders will be entered.

IT IS FIRST ORDERED that respondent's application for a waiver pursuant to Section 212(c) is granted.

IT IS NEXT ORDERED that the proceedings are terminated.

/s/ Susan L Yarborough
SUSAN YARBOROUGH,
IMMIGRATION JUDGE